Introductions

• Wendell Hall, Moderator
  • Senior Director, Higher Education, The College Board

• Art Coleman art.coleman@educationcounsel.com
  • Managing Partner, EducationCounsel, LLC.
  • Former U.S. Department of Education Deputy Assistant Secretary for Civil Rights

• Jamie Lewis Keith jamie.keith@educationcounsel.com
  • Partner, EducationCounsel, LLC
  • Former Primary Counsel, MIT; Vice-President, General Counsel and Secretary, University of Florida
Disclaimers
Lawyers...just sayin’

It depends.

It’s a question of evidence.

Facts matter.

(Nothing in this discussion constitutes institution-specific legal advice.)
Major Themes

1. Federal non-discrimination laws that govern admissions also govern aid. But, a dearth of precedent exists with respect to aid-specific policies and programs advancing diversity-related aims.

2. Major imperatives from admissions case law are likely consequential regarding aid
   - Mission and program alignment
   - Definitional clarity
   - Full inventory (including privately-endowed aid)
   - Extension of holistic review principles where feasible
   - Assurance of necessity/Examination of neutral alternatives

3. When applying general non-discrimination rules, context matters. It may have an effect on legal analysis and conclusions. (Admissions is not aid.)
   - Limited race-exclusive aid is higher risk; may be permissible if evidence proves real necessity and lack of burden on non-beneficiaries
   - Pooling funds in neutral fashion mitigates legal risk

Webinar Overview & Major Themes

Sections

I. The Legal Landscape...Past and Present
II. Kinds of Aid...and Implications
III. Strategies and Action Steps
IV. Moving Forward
I. The Legal Landscape... Past and Present
Focus of Discussion: Federal Law

Equal Protection Clause/ Title VI
• Discrimination on the basis of race and ethnicity

Equal Protection Clause/ Title IX
• Discrimination on the basis of sex
  • Emerging body of law to extend to discrimination based on sexual orientation and gender identity

Note: Many other factors are central to diversity interests, but federal law imposes heightened scrutiny (including requirements for evidence) when race, ethnicity, and sex are considerations.
State Laws May Be Relevant

Voter Initiatives/Executive Orders

- Resource:
  *Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions* (AAAS and EducationCounsel, 2012)

Federal Non-Discrimination Law

Key Questions

A focus on ends and means

Compelling/Important Interests

Educational benefits of diversity

Policy Design Specifically Tailored Design to Advance Interests

Necessity

Consideration/pursuit of neutral avenues

Impact

Flexibility

Minimal adverse impact on non-beneficiaries

Periodic review
No federal court precedent exists regarding diversity-focused financial aid and scholarship decisions involving the consideration of race and ethnicity.

- *Podberesky v. Kirwan* (1994) was a remedial case

The *U.S. Department of Education* in 1994 issued notice and comment *Title VI policy guidance*—governs USED OCR enforcement.

- Admissions cases are informative precedent
- Context matters; differences between aid and admission may result in different outcomes
- *Still in effect, but untested in court*

Fisher v. University of Texas at Austin

- Aid policy not challenged, but UT’s neutral aid was important foundation for court in upholding race-conscious admissions policy—helping establish evidence that UT pursued all viable race-neutral/less race-restrictive alternatives
1994 USED Title VI Guidance

$ Recognition of the educational benefits of diversity as a legitimate compelling interest to support aid/scholarship decisions

$ Presumption of narrow tailoring for race-as-a-factor aid, where periodic review and evaluation is evident
  • A point on which courts might differ

$ Allowance of race-exclusive aid where all narrow tailoring factors can be satisfied
  • Untested in court. Court adoption would depend on making the case about critical differences in aid and admission; and likely showing that exclusive aid was a small portion of the total aid offered
Other USED Federal Policy

$Federal Regulations

$OCR Case Resolutions re Aid

✓ Other OCR Action
Reported OCR Investigations of Note

<table>
<thead>
<tr>
<th>Alleged sex discrimination in aid, mentoring, community building, and other programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Yale University</td>
</tr>
<tr>
<td>• University of Southern California</td>
</tr>
</tbody>
</table>
II. Kinds of Aid...and Implications
Where factors of race, ethnicity, and gender are present in aid design, federal non-discrimination law is likely to insist on a **coherent, aligned set of policies and programs** that reflect:

- **Mission Alignment**
- **Program Alignment**

To establish that important foundation, IHEs should have a **clear aid strategy** that encompasses all facets of aid controlled by the institution.

**Enrollment management** has real meaning here. See Fisher v. UT.
Policy Coherence and Alignment

Key Questions

1. Does the institution have a comprehensive inventory of all policies and programs associated with student outreach, recruitment, admission and aid?

2. Do the philosophy and aims of the institution’s admission policy extend into policies associated with student outreach, recruitment, and aid? Is there fundamental alignment across sectors?

3. Where applicable, can the institution demonstrate both the need for and positive impact associated with considerations of race and ethnicity as part of any facet of enrollment practice? What evidence exists that neutral strategies or lesser use of race is inadequate?
### Types and Sources of Aid

#### Key Factors Informing the Program Overview and Levels of Inquiry

<table>
<thead>
<tr>
<th></th>
<th>Need-Based</th>
<th>Merit-Based</th>
<th>Mixed Need-Merit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government-Funded</td>
<td>No central issue. Important context.</td>
<td>Point of focus, depending on definitions.</td>
<td>Point of focus, depending on definitions.</td>
</tr>
<tr>
<td>Institution-Funded</td>
<td>No central issue. Important context.</td>
<td>Point of focus, depending on definitions.</td>
<td>Point of focus, depending on definitions.</td>
</tr>
<tr>
<td>Privately Endowed</td>
<td>No central issue. Important context.</td>
<td>Point of focus, depending on definitions.</td>
<td>Point of focus, depending on definitions.</td>
</tr>
</tbody>
</table>

**Key Point:** This category is pure-need based...race, ethnicity, and gender blind.

**Key Questions:** How is merit defined? Is it inclusive of diversity factors that raise legal issues?
Definitions

Key Questions

- **What do we mean by aid?** What is included? Just funding associated with tuition and cost of living, or more: enrichment programs, etc.?

- **How do we define merit?** What factors shape determinations of “merit” in aid—and, by extension, other enrollment efforts? Are race, ethnicity, and gender relevant to those determinations?

- **How do we define diversity?** How does your IHE define diversity—and why? What set of factors are relevant to your enrollment focus on diversity, and how do these extend to aid decisions, in particular?
III. Strategies and Action Steps
As a foundation for effective analysis and decision-making, an initial process step involves the following:

**Fully inventory all aid policies, practices and programs, to establish a comprehensive overview of all kinds of institutional aid from all sources.**

- All types of aid, regardless of whether considerations of race, ethnicity, gender are present
- All sources, with a particular focus on institution-funded, as well as privately endowed aid
  - Does the IHE engage in “significant assistance” in the administration of private aid? If so, essential to include that aid in inventory and analysis.

### Strategies and Action Steps

#### The Big Picture

- **Full Inventory**
- Determination of necessity/examination & pursuit of neutral avenues
- Rare, limited use of race-exclusive aid
- Pooling of funds
- Extension of holistic review principles where feasible
- Process management
Within that overall inventory, **identify and segregate for focused analysis all aid that involves any consideration of an individual’s race, ethnicity and/or gender**. With respect to such aid:

**Assure that you have undertaken an evaluation of the necessity of consideration of those factors with respect to achievement of institutional diversity goals.**

- Are relevant policy designs that involve such considerations necessary—at all or with as much consideration of race, ethnicity, gender?
- Have all viable neutral alternatives been considered and, where appropriate, tried?
- Have you documented with evidence the judgments you have made (decisions, rationales, data, etc.) and the processes that led to those judgments?
Within that overall inventory, and in the context outlined above:

Segregate and separately evaluate any aid that may qualify as race-, ethnicity-, or gender-exclusive.

Remember that such aid practices, while allowed under current USED policy, have not been tested in court. Very high bar here.

• Questions of necessity of exclusive aid (vs. e.g., as-a-factor aid and neutral aid) and burden on non-beneficiaries are paramount. Can you make the case?

• Critical to evaluate what portion of total aid budget exclusive aid represents if it is to be sustained under USED policy. (E.g., Very small % of total aid awarded; additive.)

Strategies and Action Steps

The Big Picture

• Full Inventory
• Determination of necessity/examination & pursuit of neutral avenues

• Rare, limited use of race-exclusive aid

• Pooling of funds
• Extension of holistic review principles where feasible
• Process management
Race-Exclusive Aid, Illustrated

Total Aid

Exclusive Aid
Strategies and Action Steps

The Big Picture

• Full Inventory
• Determination of necessity/Examination & pursuit of neutral avenues
• Rare, limited use of race-exclusive aid

• Pooling of funds
• Extension of holistic review principles where feasible
• Process management

One strategy for mitigating legal risk involves pooling of funds.

*Pooling means the placement of each individual donor gift in the same general scholarship pool with all other comparable aid. When making awards to students, the institution decides who gets aid, how much and what kind (grant, work study) completely blind to race, ethnicity and gender—but then matches individual students with awards—and strives to do so in a way that aligns with the preferences of the original donor.*

• Not tested in court, but removes consideration of race, ethnicity, and gender from actual award decision, while honoring donor wishes that may include such considerations.
Pooling, Illustrated

In light of dearth of specifically applicable case-law, and in line with aims for enrollment policy coherence, it is prudent to consider extension of admission principles that courts have affirmed.

Consider:

• **Models of aid that reflect consideration of multiple, intersecting factors associated with diversity (including but not limited to considerations involving race, etc.)**

• **Tiering of top admission candidates (based on multiple factors associated with holistic review) as a foundation for making aid awards**

---

**Strategies and Action Steps**

**The Big Picture**

- Full Inventory
- Determination of necessity/examination & pursuit of neutral avenues
- Rare, limited use of race-exclusive aid
- Pooling of funds
- Extension of holistic review principles where feasible
- Process management
Strategies and Action Steps

The Big Picture

- Full Inventory
- Determination of necessity/Examination & pursuit of neutral avenues
- Rare, limited use of race-exclusive aid
- Pooling of funds
- Extension of holistic review principles where feasible
- Process management

Team
Multidisciplinary
All facets of institution covered

Goals and Objectives
Clarity on educational goals and objectives
Foundations upon which success can be evaluated

Design
Integral part of overall enrollment management strategy
Necessity re consideration of race, ethnicity, sex (including neutral/less restrictive alternatives)
Limited burden/adverse impact on non-qualifying students
Extension of holistic review principles where possible

Process Management
Periodic review and evaluation of relevant policies, practices, and impact, including:
  - Effectiveness
    - Continuing need for consideration of race, ethnicity, gender
    - Neutral strategies pursued and rejected (and why)

Evidence
Inventory all relevant policies/practices and programs
Document decision making and assemble evidence
IV. Moving Forward
Federal Non-Discrimination Law: Implications for Higher Education Financial Aid and Scholarship Policies and Programs

Will provide undergraduate enrollment officials with practical, actionable guidance regarding the design and execution of financial aid and scholarship policies that advance diversity goals. It will:

- **Identify key issues** that should be considered in the review, evaluation, and evolution of financial aid and scholarship policies and practices associated with diversity goals;
- **Synthesize key points of law and policy** in a format designed to facilitate meaningful on-the-ground dialogue and action; and
- **Offer ideas regarding strategies and models** that merit consideration among policy leaders as they seek to achieve institutional diversity goals in legally sustainable ways.
Access & Diversity Collaborative

Who We Are & What We Do

• Established in 2004, the College Board's Access & Diversity Collaborative (ADC) provides national leadership and institutional support focused on higher education diversity goals. The ADC serves as:
  • A voice of national advocacy,
  • A resource for sophisticated and pragmatic policy and practice guidance and actionable research, and
  • A convener for thought leadership and collaborative engagement on policy and practice development.

• Over 50 institutions of higher education and 13 national organizational sponsor the ADC, which relies heavily on the support and guidance of its sponsors to identify key “on the ground” issues to address, and make recommendations regarding strategic directions.

• For more information on the ADC and on sponsorship, please visit www.collegeboard.org/accessanddiversity or email accessanddiversity@collegeboard.org.
Key Resources

Understanding Holistic Review in Higher Education Admissions
(College Board, EducationCounsel, 2018)

Building an Evidence Base
(College Board, 2017)

The Playbook
Re Neutral Alternatives
(College Board, EducationCounsel, 2016)

A Policy and Legal "Syllabus" for Diversity Programs at Colleges and Universities
(ACE, College Board, EducationCounsel, 2015)
Questions
Thank you!

Wendell Hall | whall@collegeboard.org
Art Coleman | art.coleman@educationcounsel.com
Jamie Lewis Keith | jamie.keith@educationcounsel.com